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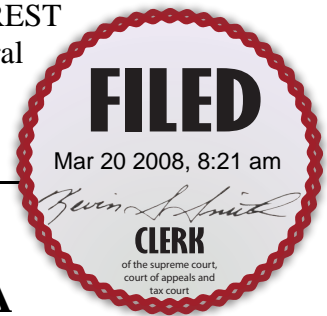
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**IN THE
COURT OF APPEALS OF INDIANA**

JERRY A. GORE.

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)))))))))

No. 18A05-0610-CR-587¹

APPEAL FROM THE DELAWARE CIRCUIT COURT

¹ As we have pointed out in Lake County Board of Elections and Registration v. Copeland, --- N.E.2d ---, No. 45A04-071-CV-560, slip op. p. 5 (Feb. 27, 2008) and Gilbert v. State, 874 N.E.2d 1015, n.1 (Ind. Ct. App. 2007), we have recently become aware of some difficulties in receiving the prompt transmission of fully-briefed appeals to our court. Indeed, the case herein was fully briefed on June 21, 2007, but was not transferred to our court until February 26, 2008—a delay of over eight months. We remind counsel that a link to the Clerk’s online docket is available at <http://www.in.gov/judiciary/cofc/> and counsel may check the docket to confirm that the case has, in fact, been transmitted to this court after being fully briefed.

March 20, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jerry Gore appeals following his convictions for Burglary Resulting in Bodily Injury,² a class A felony, two counts of Armed Robbery,³ a class B felony, two counts of Criminal Confinement,⁴ a class B felony, and Unlawful Possession of a Firearm by a Serious Violent Felon,⁵ a class B felony. Gore raises the following arguments on appeal: (1) the trial court erroneously admitted evidence of Gore's post-arrest statements to the police; (2) his convictions for criminal confinement and armed robbery violate the prohibition against double jeopardy; (3) the trial court erroneously imposed consecutive sentences for acts emanating from a single episode of criminal conduct; and (4) the sentences imposed by the trial court are inappropriate in light of the nature of the offenses and Gore's character. Finding no error, we affirm the judgment of the trial court.

² Ind. Code § 35-43-2-1.

³ Ind. Code § 35-42-5-1.

⁴ I.C. § 35-42-3-3.

⁵ Ind. Code § 35-47-4-5(c).

FACTS

On the evening of December 12, 2005, Jason Gates and his girlfriend, Angela Dailey, were asleep in their residence in Delaware County. Gates was awakened by a knock on the door at approximately 1:00 a.m. Upon answering the door, Gates saw a young woman who asked to use his phone. As Gates turned to retrieve the phone for her, Gore—who was working with the 17-year-old girl—entered the house and pressed the barrel of a gun into Gates’s neck. Curtis Bethea, who was also armed, rushed into the residence after Gore. Gore ordered Gates to the floor.

As Gore’s accomplice kept his weapon pointed at Gates, Gore entered the bedroom where Dailey was asleep, pointed a gun in her face, and said “get out of bed, bitch.” Tr. p 64, 125, 166. Gore then yanked Dailey out of bed by her hair and dragged her into the living room while aiming his gun at her head. Bethea then hogtied Gates with tape and a belt and pulled his shirt over his head. Gore straddled Dailey, holding a gun to the back of her head, and said “put your head back down, bitch, I’m going to shoot you.” Id. at 65, 82, 126, 128. A few minutes later, the young woman taped Dailey’s hands together after Gore instructed her to do so.

Gore and Bethea then proceeded to ransack the house while screaming that they were “going to shoot somebody.” Id. at 66. Gates told them where his wallet was located, and they took the money therein. They also took jewelry, Angela’s checkbook, three cell phones, some marijuana, and Dailey’s driver’s license and Social Security card so she wouldn’t “try anything stupid.” Id. at 68. At some point, Gore returned to Gates and struck him with the gun. Dailey told them where to find her car keys, which they

took. They cut the phone lines to prevent Gates and Dailey from calling the police. One of the offenders placed a couch pillow on top of Dailey and she, thinking they were going to kill her, said “please don’t do this.” Id. at 67, 170. Gore kicked Gates in the back, and then the robbers left. They stole Dailey’s car and left it in the middle of the street a few blocks away from Gates’s residence.

On February 7, 2006, police arrested Gore and took him to City Hall, where he signed a waiver of his Miranda⁶ rights and proceeded to make incriminating statements to the police. On February 14, 2006, the State charged Gore with class A felony burglary resulting in bodily injury, two counts of class B felony armed robbery, three counts of class B felony criminal confinement, class B felony unlawful possession of a firearm by a serious violent felony, two counts of class C felony intimidation, and class C felony auto theft. On July 27, 2006, Gore filed a motion to suppress his statements to the police, arguing that he had been intoxicated at the time and, therefore, had not voluntarily waived his rights. The trial court denied the motion. A jury trial was held on September 7 and 8, 2006, and Gore was found guilty as charged.

The trial court held a sentencing hearing on October 2, 2006, and found the following aggravating factors: Gore’s lengthy criminal and juvenile history, Gore was on parole at the time he committed the instant offense, Gore committed the offenses in the presence of a 17-year-old girl whom he had enlisted to gain access to the victims’ residence, and Gore used the gun to commit a violent crime. The trial court found the

⁶ Miranda v. Arizona, 384 U.S. 436 (1966).

following two mitigating circumstances: (1) Gore's remorse, though the court gave the factor minimal weight because Gore "still does not seem to comprehend . . . that in our society, one cannot take the law into his own hands and excuse as a 'misunderstanding,'" appellant's app. p. 30; and (2) Gore's young age of 24, though the court also gave this factor minimal weight given Gore's extensive delinquent and criminal history that dates back to the age of ten.

After merging a number of counts, the trial court sentenced Gore as follows: (1) forty years imprisonment for burglary; (2) fifteen years imprisonment for each of the two counts of armed robbery, to be served concurrently with each other and the burglary sentence; (3) ten years imprisonment for each of the two counts of criminal confinement, to be served concurrently with each other and consecutively to the burglary sentence; and (4) ten years imprisonment for possession of a firearm by a serious violent felon, to be served consecutively to the burglary sentence. Thus, the trial court imposed an aggregate executed sentence of sixty years. Gore now appeals.

DISCUSSION AND DECISION

I. Admission of Gore's Statements to Police

Gore argues that the trial court erroneously admitted his post-arrest statements to police into evidence. A trial court has broad discretion in ruling on the admissibility of evidence, and we will reverse the trial court only when its ruling was an abuse of that discretion. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). In evaluating the admissibility of the evidence, we will consider only the evidence

supporting the trial court's ruling and unrefuted evidence in the defendant's favor. Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002).

When a defendant challenges the admission of a confession, the State must prove beyond a reasonable doubt that the confession was given voluntarily. Jackson v. State, 735 N.E.2d 1146, 1153 (Ind. 2000). But if the defendant challenges the voluntariness of his statement based on an allegation that he was under the influence of drugs at the time, “the defendant has the burden to introduce evidence from which it could be concluded that the amount and nature of the drug consumed would produce an involuntary statement.” Pruitt v. State, 834 N.E.2d 90, 115 (Ind. 2005). The mere fact that the defendant makes a statement while under the influence of drugs does not render it per se inadmissible. Id. Instead, drug use is only a factor to be considered by the trier of fact in determining whether a statement was voluntary. Id.

Here, the only evidence supporting Gore's argument that he was under the influence of drugs at the time he made the statements to the police are his own self-serving allegations. The detective who interviewed Gore testified that he did not see any indications that Gore was intoxicated at the time of the interview. The trial court was free to believe the detective and disregard Gore's testimony, and it is not for us to second guess that evaluation. Gore is asking us to reweigh the evidence and judge the credibility of witnesses—an invitation we decline. We find that the trial court did not abuse its discretion by determining that Gore's statements were made voluntarily and admitting them into evidence at trial.

II. Double Jeopardy

Gore next argues that his convictions for armed robbery and criminal confinement violate the prohibition against double jeopardy. Specifically, he contends that the dual convictions violate the same evidence test, which examines the evidence presented at trial to determine whether each offense was established by separate and distinct facts. Richardson v. State, 717 N.E.2d 32, 52 (Ind. 1999). To establish a double jeopardy violation, the defendant must demonstrate a reasonable possibility that the evidentiary facts used by the factfinder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Id. The possibility must be more than speculative or remote. Griffin v. State, 717 N.E.2d 73, 89 (Ind. 1999).

Double jeopardy does not prohibit dual convictions of confinement and robbery so long as the facts indicate that the confinement was more extensive than that necessary to commit the robbery. Hopkins v. State, 759 N.E.2d 633, 639 (Ind. 2001); see also Benavides v. State, 808 N.E.2d 708, 712 (Ind. Ct. App. 2004) (finding confinement was more extensive than necessary to commit robbery where the defendant confined the victim “in the bedroom at gunpoint before forcing her into the living room where he took money, marijuana, and prescription pills”); Boatright v. State, 759 N.E.2d 1038, 1044 (Ind. Ct. App. 2001) (finding confinement was more extensive than necessary to commit robbery when the confinement occurred when the defendant forced the victim into the back office of a motel and the robbery was the distinct transgression of taking money from the victim’s purse).

Here, Gore yanked Dailey out of bed by her hair and dragged her into the living room while aiming his gun at her head. He then straddled her, held a gun to the back of her head, and said “put your head back down, bitch, I’m going to shoot you.” Tr. at 65, 82, 126, 128. A few minutes later, Gore’s accomplice taped Dailey’s hands together. Gates was held at gunpoint, and eventually, Bethea hogtied Gates with tape and a belt and pulled his shirt over his head. Gore and Bethea then proceeded to ransack the house, taking money from Gates’s wallet, emptying Dailey’s purse, taking Dailey’s car keys, and taking a number of other items from the house. The entire incident lasted between fifteen and twenty minutes.

It is evident that this confinement was more extensive than necessary to commit the robbery. Gates and Dailey were subdued and compliant when held at gunpoint; it was unnecessary to hogtie Gates and pull his shirt over his head and to tape Dailey’s hands together. Similarly, the force used—including dragging Dailey by her hair, covering her with pillows, striking Gates with a gun, and kicking Gates in the back—was far more than necessary to complete the robbery. Under these circumstances, we find that Gore’s convictions for robbery and criminal confinement do not violate double jeopardy.

III. Consecutive Sentences

Gore next argues that the trial court erroneously ordered his sentences for burglary, one count of criminal confinement, and possession of a firearm by a serious violent felon to be served consecutively. He argues that his acts constituted a single episode of criminal conduct and directs our attention to Indiana Code section 35-50-1-2(c), which provides as follows:

except for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

(Emphasis added). Burglary is a crime of violence, but criminal confinement and possession of a firearm are not. I.C. § 35-50-1-2(a).

We will assume for argument's sake that Gore's actions constituted a single episode of criminal conduct. Inasmuch as burglary is a crime of violence, the sentence for that crime can be ordered to be served consecutively to those for Gore's other crimes. McCarthy v. State, 751 N.E.2d 753, 756 (Ind. Ct. App. 2001). Thus, the trial court did not err on this basis.

Gore's convictions for criminal confinement and unlawful possession of a firearm by a serious violent felon were both class B felonies. The advisory sentence for a class A felony—one class of felony higher than class B—is thirty years. The trial court imposed consecutive ten-year sentences for each of these convictions, totaling twenty years imprisonment—well within the thirty-year limitation. See id. (holding that a six-year sentence for involuntary manslaughter, a crime of violence, could served consecutively to two consecutive four-year sentences for criminal recklessness, not a crime of violence, even though all crimes arose out of the same criminal episode, because the total of eight years for class C felony criminal recklessness was less than the ten-year advisory sentence for a class B felony). Therefore, we find that the trial court properly ordered

Gore's sentences for burglary, criminal confinement, and unlawful possession of a firearm to be served consecutively.

IV. Appropriateness

Finally, Gore argues that the sentences imposed by the trial court are inappropriate in light of the nature of the offenses and his character.⁷ Indiana Appellate Rule 7(B) provides that the “[c]ourt may review a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of Gore’s offenses, he enlisted the aid of a 17-year-old girl to invade a home in the middle of the night. He and his accomplices proceeded to drag one victim by her hair into the living room at gunpoint, tie her hands together, and put her in fear for her life. They also hogtied the other victim, striking him with a gun and kicking him in the back. They remained in the residence for fifteen to twenty minutes, ransacking the home and threatening to kill someone, taking money, car keys, jewelry, and other things, cutting the phone line before they left, and stealing the vehicle

⁷ To the extent that Gore argues that the trial court erred in weighing aggravating and mitigating factors, we note that “a trial court [cannot] now be said to have abused its discretion in failing to ‘properly weigh’” aggravators and mitigators. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007).

belonging to one of the victims. We do not find the nature of these offenses to aid Gore's argument that his sentences were inappropriate.

As for Gore's character, we observe that he has an extensive juvenile and criminal history that is especially sobering given that he was only twenty-four years old at the time he was sentenced for the instant offenses. His juvenile history dates back to when he was ten years old and includes, among other things, adjudications for offenses that would be theft, battery, criminal mischief, possession of stolen property, disorderly conduct, resisting law enforcement, and criminal recklessness if committed by an adult. His criminal history includes one felony conviction for class B felony burglary and seven misdemeanor convictions. Furthermore, Gore was on parole when he committed the offenses herein.

Although Gore argues that he expressed remorse for his crimes, we note that the trial court concluded that Gore's remorse was somewhat less than sincere, given that Gore's "apology" was for "whatever misunderstanding [he] had" that led him to break into a home in the middle of the night, tie up the victims, and rob them at gunpoint while threatening to kill them. Tr. p. 269. Moreover, Gore attempted to excuse his conduct by saying that he was "hanging out with the wrong crowd" and blaming the system for failing to "give the treatment they was supposed to give" and the prosecutor for making it "seem like [Gore is] the only criminal in society that does these things." *Id.* at 270-71, 272, 274. We cannot say that the trial court erred by determining that Gore's remorse was insincere and that he had not truly accepted responsibility for his actions. In sum, we

do not find that the sentences imposed by the trial court were inappropriate in light of the nature of the offenses and Gore's character.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.